**SUBURBAN MIDDLESEX
INSULATION, INC.**

VABCA-4896

CONTRACT NO. V631C-667

**VA MEDICAL CENTER
NORTHAMPTON, MASSACHUSETTS**

Joseph A. Camardo, Jr., Esq., and Morgan R. Thurston, Esq., Auburn, New York, for the Appellant.

Paul A. Embroski, Esq., Trial Attorney; ***Charlma O. Jones, Esq.,*** Deputy Assistant General Counsel; and ***Phillipa L. Anderson, Esq.***, Assistant General Counsel, Washington, D.C., for the Department of Veterans Affairs.

DECISION ON GOVERNMENT'S MOTION TO SUSPEND PROCEEDINGS

The appeal of Suburban Middlesex Insulation, Inc. (SMI or Contractor), from the Contracting Officer's failure to issue a final decision was received and docketed on May 24, 1996. This appeal involves the Termination for Convenience by the Department of Veterans Affairs (VA or Government) of contract No. V631C-667, Remove Asbestos (Phase ll.), VA Medical Center Northampton, Massachusetts, and the Contractor's subsequent claim. This ruling is issued in response to the Respondent's Motion to Suspend Proceedings, and Appellant's Response thereto, pending the outcome of a criminal investigation being conducted by the Assistant United States Attorney for the District of Massachusetts. The Record consists of the Complaint, Amended Complaint, Rule 4 (R4) File, tabs 1 through 114; and the Appellant's Rule 4 Supplement (R4 Supp), tabs 500 through 514, the Affidavits of Darrell MacLean dated November 12 and July 17, 1996 and a letter from the Assistant United States Attorney for the District of Massachusetts. Respondent has not filed an Answer.

FINDINGS OF FACT

SMI was awarded the contract at issue on September 27, 1994 in the amount of $314,545. (R4, tab 3) Although dated October 20, 1994, the Notice to Proceed is signed and dated for receipt by SMI on October 18, 1994. (R4, tab 4) On November 15, 1994, Darrell MacLean, SMI's vice-president, wrote Douglas Brown, Contracting Administrator, Acquisition and Material Management Service, to confirm oral instructions, received from Ray Bellis, VA Engineering, Service, the day before, "that the steam tunnel portion of the work cannot be carried out at this time" because the Government would be unable to close down the steam pipes. (R4, tab 8) Mr. MacLean also asserted in his letter that the steam tunnel was to be made available that very day and "75% of this project work is on the steam tunnel."

The parties seem to agree that the problem with the steam tunnels required the Contractor to perform the remaining and alternate work out of sequence. Appellant argues that buildings were not made available to him in a timely manner, causing periods where no work could be performed and, further, that on or about November 18, 1994, the

VA changed the work hours from the agreed to nighttime hours to 8:00 A.M. to 4:30 P.M. SMI also alleges that the VA's consultant behaved improperly and made comments which delayed and disrupted SMI's performance and created a racially tense working environment which caused SMI's project supervisor to be "banned" from the job site. Allegedly, the VA consultant stated he would stretch SMI's completion out to increase his own billing time. The Record indicates that the Contracting Officer's Technical Representative (COTR) recommended a Termination for Default on November 23, 1994, just nine days into the contract performance, based on non-conforming materials and performance problems. (R4, tab 24) Two days later the Contracting Officer issued a Cure Notice. (R4, tab 28) SMI alleges that the VA's actions against him were attempts to make him look bad and divert the attention away from the VA's handling of the steam lines.

Numerous pieces of correspondence were exchanged and discussions were held on many issues during the November-early December time frame. On December 15, 1994, the Contracting Officer issued a Notice of Termination for the Convenience of the Government. (R4, tab 88) The Contract was to be terminated after certain listed work was completed, or December 30, 1994, whichever occurred first. The termination had been discussed with Mr. MacLean earlier as acknowledged by his letter of December 14, 1994. (R4, tab 84) During the next few months the parties discussed progress payments and the Contractor's lack of compliance with reporting and record keeping for the work performed. On March 23, 1995 the VA forwarded a statement in the amount of $21,248.44 representing the third and final progress payment. Previous payments totaled $28,532.56. (R4, tab 104) SMI responded through its counsel that it would not give a full release of claims and exempted out:

1. The Termination for Convenience Settlement proposal which will be submitted on a total cost basis, pursuant to the Termination issued on December 15, 1994;

2. All additional costs attributable to the work performed under the subject contract, which were expended due to the defects in the Government-supplied contract documentation and the appurtenant delays and disruptions.

(R4, tab 104 at 6)

SMI submitted a Termination Settlement Proposal in the amount of $222,966.34 on July 5, 1995. (R4, tab 105) On July 11, 1995, the Contracting Officer, Kathryn Hamelin, advised SMI that a technical review and audit would be performed on the claim. (R4, tab 106) SMI requested a partial payment on July 21, 1995, in the amount of $100,000. (R4, tab 107) In SMI's letter to the Contracting Officer dated October 9, 1995, Mr. MacLean demanded a final decision on his $222,966.34 claim which he acknowledged had been referred by Ms. Hamelin to the VA's Office of Inspector General "for investigation." (R4, tab 110) Ms. Hamelin confirmed the OIG involvement and stated that the OIG was doing a "criminal investigation" in a letter dated October 10, 1995. (R4, tab 111)

On November 1, 1995, the Appellant filed a Notice of Appeal with this Board. We dismissed the appeal on December 1, 1995, because the statutorily mandated 60 days had not expired from the date of the Contracting Officer's receipt of the claim. The Contracting Officer notified the Appellant on December 5, 1995, that the OIG investigation would be completed by May 1, 1996, and she would issue the final decision

by May 15, 1996. On May 3, 1996, the Contracting Officer extended the date for the final decision to August 15, 1996, based on a May 1, 1996, letter from the OIG's Resident Agent in Charge. That letter states that a significant amount of fraudulent activity was disclosed during the investigation and they needed three additional months for the completion of their investigation. The letter stated that an audit had been completed and discloses questionable costs (amount redacted); a separate investigation had apparently disclosed additional questionable costs, and, in April "evidence" was presented to an Assistant United States Attorney (AUSA) who believed there was "prosecutive merit."

By letter dated May 22, 1996, SMI appealed the deemed denial of its claim to this Board. We denied the Government's Motion to Dismiss for Lack of Jurisdiction because the Contracting Officer had a reasonable time to issue the final decision. ***Suburban Middlesex Insulation, Inc.***, VABCA No. 4896, 96-2 BCA ¶ 28,481. After timely submissions of the Complaint and Rule 4 file, the Respondent submitted its Motion to Suspend. Attached to the Respondent's Motion was an October 15, 1996, letter from Susan G. Winkler, AUSA for the District of Massachusetts, in which she informed Government Counsel that her office had accepted the referral from the OIG and had opened a false claims investigation of the Termination Settlement Proposal, application for partial payment and certified termination claim. The Appellant opposed the suspension and filed its Response to Respondent's Motion to Suspend on November 15, 1996. An Amended Complaint was received by the Board on November 27, 1996.

DISCUSSION

Both parties have cited ***Superior Surgical Mfg. Co., Inc***., VABCA No. 3748, 93-2 BCA ¶ 25,826, as setting forth the criteria for resolution of this Motion. Appellant correctly states that the Board must be mindful of the Contractor's statutory right to the expeditious resolution of its appeal. 41 U.S.C. § 607(e). Thus, a heavy burden is placed on the Government when it seeks a suspension of proceedings. Specifically, the Government must meet a three part test by a clear showing : 1) that the issues in the civil action are "related," as well as "substantially similar" to the issues being investigated; 2) that the Government would clearly suffer "hardship or inequity" if required to go forward with the Board proceedings; and 3) that the period of suspension requested is "not immoderate or unreasonable." ***Superior***, at 128,559.

It seems clear that the issues being investigated by the AUSA are identical to the issues before the Board. The Contractor was terminated for convenience and in response submitted a Termination Settlement Proposal to the Contracting Officer who, in turn, submitted it to the OIG. The OIG opened an investigation of the claim and subsequently sent the claim to the AUSA. The letter of the AUSA dated October 15,1996 is quoted in Appellant's response as follows:

First the USAO is investigating whether Middlesex knowingly presented false or fraudulent claims for payment to the VA by submitting the termination settlement proposal, application(s) for partial payment, and certified termination claims based upon false or fraudulent invoices, time sheets, and other supporting documentation. In its complaint before the Board, Middlesex appeals a "deemed denial" by the Contracting Officer of its Termination Claim, and seeks payment of the amount in issue, $177,262.43 This termination claim, and the prior claims for payment submitted to the VA in

connection therewith, are precisely the alleged false claims under investigation by the USAO. The relief sought by Middlesex, payment of the amount in issue, is integrally related to the USAO'S investigation of whether the claim on which the request for payment is based is knowingly false or fraudulent.

We cannot agree with Appellant's assertion that this statement is nothing more than general allegations. The termination claim in the amount of $177,262.43 is precisely what is before the Board. Appellant's Amended Complaint changes the amount claimed to $177,446.86, but that does not appear to have any impact on the issues before us. We find that the issues under investigation are integrally related to the Appellant's claim before the Board.

However, it is important to note that the Supreme Court places the heavy burden of establishing entitlement to a stay on the movant, who must show a clear case of hardship by being required to go forward. ***Landis v. North American Co.***, 299 U.S. 248 (1936). As we stated in ***Surgicial***, 93-2 BCA at 128,559, "[t]his can be accomplished by demonstrating that the proceedings would be duplicated, ***C3, Inc. v. United States,*** 4 Cl. Ct. 790, 791 (1984); ***St. Paul***, 24 Cl. Ct. at 516-7, or that the criminal investigation would somehow be adversely affected by continued discovery or resolutions of the issues before us."

The AUSA's letter of October 15, 1996 asserts that:

> Moreover, the proceedings before the Board will be duplicative of the USAO investigation because the underlying issue, whether and to what extent the claims for payment submitted by Middlesex are false or fraudulent, must be resolved in either forum. The witnesses and documentary evidence should be identical because the underlying question of the legitimacy of Middlesex's claim is the same. A decision by the Board could moot the USAO's investigation, or could conclude with inconsistent results. Here, were the Board to go forward, the government could suffer inequity because a full investigation could not be performed and all remedies available to the government for submission of false claims for payment could not be pursued.

Appellant argues that since the Board proceedings are just beginning, there can be no realistic argument that a decision of the Board could possibly be rendered prior to, or in conflict with the investigation. Thus, it asserts that the motion is not ripe. In addition, SMI argues that the duplication of witnesses is without merit as this is only an investigation. Appellant also takes exception to the statement that if the Board proceedings continue, a full investigation could not be performed or all remedies could not be pursued.

Where it is clear that the issues both under investigation and before the Board are "related" as well as "substantially similar," it is equally apparent that there will be a substantial, if not a total, overlap of witnesses and documentary evidence. ***St. Paul Fire and Marine Insurance Co. v. United States***, 24 Cl. Ct. 513, 516 (1991). The reason why courts attempt to avoid concurrent civil and criminal suits is that "the broader discovery permissible in civil cases should not be used to compromise parallel criminal

proceedings" ***Litton v. United States***, 215 Ct. Cl. 1056, 1058 (1978). This is particularly true in the instance where the parallel criminal investigation may be said to "churn over the same evidentiary material." ***Peden v. United States,*** 512 F.2d 1099 (1975). Accordingly, "where such a compromising situation is considered likely, the public's interest in law enforcement surfaces and mandates that criminal proceedings be given priority over the concurrent civil proceedings." ***C3 4 Cl. Ct>*** at 791. *See* ***Peden 512 F2d*** at 1103.

Given these well-founded principles, we find that the Government has met its burden because it has sufficiently established that it is likely that the Respondent will suffer duplication and clear hardship or inequity as a result of simultaneously conducting both Board and criminal proceedings. Appellant argues that the inequities suffered by them, namely the financing and support of a project that had to be terminated because of the VA's poor planning, etc., should be taken into consideration when weighing this factor. Taking all of these factors into consideration, we believe that at this juncture the public's interest in law enforcement mandates that the criminal proceeding be given priority over the Board's proceeding.

Having shown that the facts in both proceedings are related and substantially similar, the Government must also show that the length of the request to suspend is reasonable. The AUSA states that it will take until April 10, 1997, to complete the criminal investigation and to determine if defendant will prosecute Appellant. Respondent contends that this request is moderate and reasonable, while SMI contends otherwise. As Appellant points out, this matter was initially given to the OIG in August of 1995. Appellant has already been under investigation for 15 months and objects to the AUSA seeking an additional 6 months. The Contract work involved here lasted only three months and the investigation will take 21 months. Relying on ***Todd Shipyards Corporation****, AS*BCA No. 31092, 88-1 BCA ¶ 20,509, Appellant argues that there are no contemporaneous criminal and civil proceedings and that, as in ***Todd***, the Government has had access to all of Appellant's files and records, yet has still not made a decision about whether to prosecute. One distinguishing point in ***Todd*** is there was no finding that the two were "related" or "substantially similar." We understand the Appellant's arguments about the length of time consumed thus far by the Government and its frustration and desire to have the Board's procedures move quickly in order to try and recover its termination costs. We find that the Government is nearing the outer limits of reasonable time on this matter.

To the extent that the facts of the appeal warrant such a request, a stay of civil proceedings may be granted by a court so long as that discretion is not abused and the stay is "kept within the bounds of moderation." ***Landis****,* 299 U.S.at 256. Because the criminal and board matters appear to be identical, the interests of justice require our application of the "practice to 'freeze' civil proceedings when criminal prosecution involving the same facts is warming up or under way [so as to obviate] improper interference with [on-going] criminal proceedings." ***C3, Inc***., 5 Cl. Ct. at 661, *citing* ***Peden***, 512 F.2d at 1103, and ***Litton Systems, Inc.***, 215 Ct. Cl. at 1057-58). Accordingly, we will grant Respondent's request for a stay of proceedings until April 10, 1997, to conclude its investigation.

At the same time, we have a statutory mandate under the Contract Disputes Act to

provide an expeditious resolution of contract disputes to the fullest extent practicable. 41 U.S.C. § 607(e). It is settled that "[t]he constitution does not require a civil action to be stayed until criminal proceedings are no longer possible." ***Favaloro v. S/S Golden Gate***, 687 F.Supp. 475, 481 (N.D.Cal. 1987). Rather, the decision to stay the civil action lies within the sound discretion of the court. ***Landis,*** 299 U.S. at 255-56. In such circumstance, we make our determination regarding the stay based on the facts of each case and seek to balance the unfairness to each party. ***Favaloro***, 687 F.Supp. at 482. On the facts before us, we are reluctant to require the Government to proceed before this Board when a related criminal investigation proceeding is still in progress, ***Litton Systems, Inc.,*** at 1057-58; ***Peden***, at 338-39. However, based on the Record before us, the Board would not be inclined to look favorably on any future requests for additional suspension.

DECISION

This appeal is placed in suspense until April 10, 1997.

DATE: **December 19, 1996**

WILLIAM E. THOMAS
Administrative Judge
Panel Chairman

We Concur:

GUY H. MCMICHAEL III
Chief Administrative Judge

MORRIS PULLARA, JR.
Administrative Judge